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CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 238

DOROTHEA QUIRK, Administratrix De Bonis Non of the Estate of Edward E. Quirk, Deceased,

Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation, Sometimes Known and Described as Nickel Plate Road,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND BRIEF THEREON

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND BRIEF THEREON

(The repeated use, in referring to petitioner's petition and brief, of the words "petitioner's petition and brief" would unnecessarily extend this brief. Hence, with the indulgence of the court, where we refer to petitioner's petition and brief herein, we will use only the letter "P" followed by the number of the page of petitioner's petition and brief, e. g. "P. 1").

Regarding Petitioner's Summary Statement in the Petition (P. 1-4) and Petitioner's Statement in the Brief (P. 8-11).

The first paragraph of petitioner's summary statement (P. 1-2) is inaccurate, because it fails to show that jurisdiction was laid in the complaint in this action solely on the ground that a statute of the United States was involved (the Federal Employers' Liability Act). The complaint did not allege diversity of citizenship, and such diversity was not supported by any evidence, and the trial court's jurisdiction, as well as petitioner's right of recovery, depended upon the establishment of employment in interstate commerce.

We submit that the sole question involved on this appeal is as follows:

Was decedent, at the time he received the injury, which caused his death, engaged in his employment for defendant so as to invoke the provisions of the Federal Employers' Liability Act, or give the United States District Court jurisdiction laid exclusively under that Act? More particularly, was he still within his employment on the basis that he was going home from work, or had his work terminated for the day prior to his injury?

Defendant's contention that the trial court was without jurisdiction under the Federal Employers' Liability Act was raised at every opportunity and by the following methods:

1. By denial, in rhetorical paragraph 3 of defendant's answer, of the jurisdictional allegation in the complaint (R. p. 6);

2. By motion to dismiss filed at the close of plaintiff's evidence (R. p. 9);

3. By motion to dismiss filed at the close of all the evidence (R. p. 11);

4. By defendant's tendered instruction numbered 1 (R. p. 95);

5. By defendant's objection to the court's charge submitting the issue of interstate commerce to the jury (R. p. 91, l. 42 to p. 93, l. 4);

6. By motion to set aside the verdict and dismiss the action filed after the verdict was returned (R. p. 98).

Aside from the jurisdictional aspect of this question of interstate employment, defendant's assertion that plaintiff was not entitled to recover on the merits under the Federal Employers' Liability Act by reason of his termination of employment, as to which there was no controversy in the evidence and as to which only a question of law for the court was presented, was likewise tendered to the trial court at all opportunities, as follows:

1. Defendant's motion for directed verdict at the close of plaintiff's evidence (R. p. 10);

2. Defendant's motion for directed verdict at the close of all the evidence (R. p. 12);

3. Defendant's tendered instruction numbered 1 (R. p. 95);

4. Defendant's objection to the court's charge (R. p. 91, l. 42, to p. 93, l. 4);

5. Defendant's motion to set aside the verdict and enter judgment in accordance with the motion for directed verdict, filed after the verdict was returned (R. p. 97).

The facts set out in the summary statement in the petition (P. 2-4) are incomplete, because of the omission of the following facts:

(1) defendant's line of railroad, on which decedent was killed, was intrastate (R. 23);

(2) decedent's duties required him to be in charge of the operation of a work train, including getting the train out in the morning and putting it away at night, and decedent could, and in accordance with his duties and prior instructions from his superior, should, have stayed at the scene of his employment at Muncie at his employer's expense (R. 21, 22, 35, 36, 38 and 44);

(3) the Tipton gang working with the work train at Muncie were conveyed by defendant by truck from Tipton to Muncie and returned each day, and another gang from Cammack also worked with the work train and started work before the Tipton gang arrived at Muncie, under decedent's supervision, and it was decedent's duty to be at Muncie to work prior to the arrival of the gang from Tipton the day following the injury (R. 37, 38 and 48);

(4) work had been assigned to decedent at Muncie for the day following his injury (R. 37);

(5) decedent had been instructed by his superior that whenever he was in charge of his work train he should stay with the work train, including getting the train out in the morning and putting it away at night (R. 38, 44);

(6) after decedent ceased work at Muncie he traveled 42 miles to Tipton by private automobile of his own selection and procurement before boarding the motor car to go to his home at Sharpsville, and made this trip for his own private purpose to see a basketball game, and not on any duty, or business, for respondent, and without any consent, or instructions, from respondent, and respondent did not own the automobile, nor pay any expense of the operation thereof (R. 35, 39, 61 and 62);

(7) at Tipton decedent found that the motor car usually used by him had been taken by another employee, and he started to Sharpsville on a motor car, which had never been assigned for his use for any purpose (R. 39, 48, 49 and 67);

(8) decedent started from Tipton for Sharpsville two hours after he had left Muncie (R. 49 and 60);

(9) respondent had not provided any motor car to decedent for his use in going from Tipton to his home at Sharpsville, but, at most, had merely not objected to such use (R. 27 and 45);

(10) decedent, at the time of his injury, was not on the premises where his day's work had been done, nor on any premises of respondent closely adjacent thereto (R. 35), and

(11) decedent lived at Sharpsville, six miles from his normal terminal of employment at Tipton, from his own choice and not by any request, or compulsion, by respondent (R. 20, 43 and 44).

The statement of facts in the brief (P. 9-10) are incomplete, because of omission of the same pertinent facts above set out.

We would refer the court to the facts as set out in the memorandum of the trial court (R. 99-100) and the statement of facts set out in the opinion of the Circuit Court of Appeals (R. 121-122).

Regarding Petitioner's Assertion of this Court's Jurisdiction in the Petition (P. 4-6) and in the Brief (P. 8).

Petitioner rests this court's jurisdiction on the assertion (1) that the decision of the Circuit Court of Appeals is in conflict with other decided cases, or (2) that this

decision decides an important question under a federal statute, which has not been, but should be, settled by this court.

It is respondent's belief that the decision in this case conflicts with no other decided case, as we know of no other decided case, which has closely similar facts or which declares any contrary principle of law, as hereinafter discussed in this brief.

It is likewise respondent's belief that there is no question decided by this case, which has importance, because, under the facts of this case, there can be no reasonable contention that decedent's employment had not terminated, as will later be discussed in this brief.

Regarding Questions Presented and Reasons for Allowance of Writ (P. 6).

Respondent has already referred to our version of the questions presented, (page 2, supra) and our contention regarding the reasons relied upon for allowance of writ (page 5, supra).

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ARGUMENT

Respondent's Basic Propositions

Respondent will now state its propositions and argument to support its contentions on this appeal, and will later (p. 27, infra) tender its specific answers to petitioner's petition and brief, referring to the respective pages thereof.

Interstate Employment Jurisdictional

PROPOSITION A

Diversity of citizenship was not alleged in the complaint nor shown by any evidence, and, hence, cannot be relied upon for jurisdiction. The complaint affirmatively alleged that jurisdiction was involked under the Federal Employers' Liability Act and pleaded the necessary jurisdictional amount (R. p. 2), and it was stipulated in evidence that jurisdiction depended upon the Federal Employers' Liability Act (R. p. 14). The allegation of employment in interstate commerce in the complaint necessary to make the Federal Employers' Liability Act applicable was denied in respondent's answer (R. p. 6), and this jurisdictional fact was thereby placed in issue. If this jurisdictional fact was not established, then the action did not arise under a law of the United States and the trial court had no jurisdiction.

62 Stat 930 (1948), 28 USCA, Sec. 1331 (Jurisdictional Statute);

35 Stat 65 (1908), 53 Stat 1404 (1939); 45 USCA, Sec. 51 (Federal Employers' Liability Act).

Employment Relation Essential

PROPOSITION B

The Federal Employers' Liability Act is applicable only

if the relationship of employer and employee exists (which relationship did not exist under the undisputed evidence in the instant case, since the work of decedent had terminated prior to the injury which caused his death.)

35 Stat 65 (1908), 53 Stat 1404 (1939); 45 USCA, Sec. 51, (Federal Employers' Liability Act);

Robinson v. Baltimore, etc., R. C., (1919) 237 US 84, 94, 35 S Ct 491, 59 L. Ed. 849, 855, 853;

Hull v. Philadelphia, etc., R. C. (1920) 252 US 475, 479, 40 S Ct 358, 64 L. Ed. 670, 673;

Stevenson v. Lake, etc. R. Co. (CCA, 6th Cir, 1930) 42 Fed (2) 357, 358;

Chicago, etc. R. Co. v. Bond (1916) 240 US 449, 457, 36 S Ct 403, 60 L. Ed. 735, 738.

Federal Employers' Liability Act Amendment

PROPOSITION C

The 1939 amendment to the Federal Employers' Liability Act

(a) broadened the scope of the Act with regard to employments included, and

(b) terminated the rule that the character of the employment was determined by the specific work being done at the time of injury.

However, the 1939 amendment made no change in the Act with regard to the necessity for the existence of the relationship of employer and employee, nor with regard to the termination of such relationship.

35 Stat 65 (1908), 53 Stat 1404 (1939 Amendment), 45 USCA, Sec. 51, (Federal Employers' Liability Act, as amended);

Pritt v. West Virginia, etc., R. C., (1948), (W. Va.), 51 S. E. (2) 105, ALR (2) 562, 574, cert den 336 US 961, 93 L. Ad. 1113.

Decedent's Employment Terminated Under Uncontroverted Evidence

Respondent's Statement of Facts

PROPOSITION D

While it is conceded that the general employment of decedent on the day of, but prior to, his injury was in interstate commerce, the uncontroverted evidence demonstrated that his employment terminated prior to his injury, and, hence, the Federal Employers' Liability Act had no application, by reason of the following uncontroverted facts shown by the evidence:

(1) After decedent ceased work at Muncie, he traveled 42 miles to Tipton (R. p. 35, l. 8) by private automobile of his own selection and procurement, before boarding the motor car to go to his home at Sharpsville (R. p. 61, l .9, to p. 62, l. 8; p. 35, l. 8).

(2) The trip from Tipton to Sharpsville, during which decedent was injured, occurred several hours after decedent ceased work at Muncie (R. p. 60, l. 25 to l. 29; p. 49, l. 24 to l. 28).

(3) Decedent could, and in accordance with his duty and prior instructions from his superior, should have stayed at the scene of his employment at Muncie. (R. p. 21, l. 25 to l. 42; p. 22, l. 11 to l. 21; p. 22, l. 36 to l. 41; p. 35, l. 20, to p. 39, l. 27; p. 38, l. 1, to p. 39, l. 6; p. 44, l. 23 to l. 31.)

(4) Decedent left Muncie to go to his home at Sharpsville for his own private purpose and not on any duty or business for respondent. (R. p. 61, l. 9, to p. 62, l. 22.)

(5) Decedent's trip from Tipton to Sharpsville was intrastate on an intrastate line of railroad. (R. p. 23, l. 23 to l. 30.)

(6) Decedent, at the time of his injury, was not on the premises where his day's work had been done, nor on any premises of respondent closely adjacent thereto. (R. p. 35, l. 7 to l. 9.)

(7) Respondent had not provided any motor car to decedent for his use in going from Tipton to his home at Sharpsville, but, at most, had merely not objected to such use. (R. p. 27, l. 6 to l. 20; p. 45, l. 4 to l. 10.)

(8) Decedent was not using the motor car which he was permitted to use in going to his home, but was using an entirely different motor car without respondent's consent. (R. p. 39, l. 24 to l. 27; p. 48, l. 21 to l. 23; p. 49, l. 20 to l. 23; p. 67, l. 1 to l. 2.)

(9) Decedent lived at Sharpsville, six miles from his normal terminal of employment at Tipton, from his own choice and not by any request or compulsion by respondent. (R. p. 20, l. 6 to l. 8; p. 43, l. 30 to l. 33; p. 44, l. 31 to l. 37.)

Court Statement of Facts

A statement of the facts in evidence is set out in the trial court's memorandum (R. 99-100) and a similar statement is set out in the opinion of the Circuit Court of Appeals (R. 121-122), as follows:

> "Defendant operated an interstate line of railroad through Muncie and Tipton, Indiana. It also operated an intrastate line between Michigan City, Indiana, and Indianapolis, Indiana, which crossed the interstate line at Tipton and passed through Sharpsville, Indiana. Decedent worked during a part of the day of his injury at Muncie, Indiana, on the interstate line but his injury occurred upon the intrastate line.
>
> "Decedent was a general foreman for defendant with supervision over track construction and main-

tenance, including operation of work trains. His headquarters were at Tipton but he lived at Sharpsville, six miles distant from Tipton. He had been furnished a one-man motor car by defendant for use in traveling over his work territory, which he also used, without objection on the part of defendant, in going between his home at Sharpsville and his headquarters at Tipton. Several days prior to ,and including November 5, 1948, the day of his injury, he had been assigned to and engaged in the operation of a work train and three gangs of men at Muncie on a job, the completion of which required several more days. Decedent had instructions from his superior to stay with the work train. His duty required his presence so as to get the train out in the morning and put it away at night. Decedent spent the two nights previous to the day of his injury at his home in Sharpsville. This was not known to the defendant, although the decedent had previously under similar circumstances and with defendant's knowledge returned to his home for the night, apparently with no objection by the defendant. There is no evidence as to what form of conveyance decedent used going to Muncie on the day of his injury; however, it is shown that the gang working with the train at Muncie, over which decedent had supervision, was conveyed by defendant's truck from Tipton to Muncie . Also under decedent's supervision at Muncie was the Cammack gang, which arrived at Muncie previous to the Tipton gang. Decedent had been assigned to Muncie for the day following his injury, and it was his duty to be on hand prior to the arrival of the gang from Tipton. Decedent could have remained at Muncie at the expense of the defendant.

On November 5, 1948, the work at Muncie was suspended before the usual time on account of the weather. After the gang had quit work, decedent,

without notifying his superior, left Muncie about 3:10 p. m., bound for his home in Sharpsville, so that he might see a basketball game in which his son was to participate. He rode from Muncie to Tipton, a distance of forty-two miles, by automobile owned and operated by a fellow employee. It was stipulated 'that defendant did not furnish to plaintiff's decedent said automobile in which he rode from Muncie, Indiana, to Tipton, Indiana, and that said automobile was not owned, or operated, by defendant.' At Tipton, decedent found that the motor car commonly used by him had been taken by one Collins, also an employee of the defendant. Decedent, some two hours after he had left Muncie, took another motor car, which had not previously been used by him, and started from Tipton for Sharpsville. On this journey, the motor car driven by the decedent and the one driven by Collins collided, from which collision the decedent sustained injuries resulting in his death."

Decisions on Employment Termination

Respondent desires now to discuss authorities pertinent to the foregoing facts.

The question as to when an employee is in interstate commerce when he is "going home from work" in such commerce is discussed, with authorities, in Roberts' "Federal Liability of Carriers" second edition, Volume II, section 739, page 1391. On page 1393 of the text the rule is stated as follows:

> "In general, when an employee is summoned for duty in connection with interstate transportation, he is within the protection of the federal act as soon as he comes upon the premises of the railway company; and, he is also under the same protection while, after leaving his duties, he is passing out of the premises of his employer, *provided it is*

done within a reasonable time and along the usual route." (Our Italics.)

In reference to the above quoted language we would call the attention of the court to the fact that decedent was returning home several hours after his actual work at Muncie, Indiana, had terminated, and the route which he used included a trip by third party automobile over a distance of 42 miles.

The case of *Glover v. Union, etc. R. Co.* (D. C. Idaho 1938) 21 F. Suppl. 618, holds that the employee in that case was engaged *in interstate commerce,* but bases the decision on the ground that he was riding in a vehicle engaged in interstate commerce provided by his employer and that this was done *pursuant to the employer's direction.* The reasoning upon which the court arrives at its decision is in support of the contention of respondent in this case.

In the case of *Krysiak vs. Pennsylvania R. Co.* (1921), 270 Fed. 758, 759, 760, the court, in deciding against the employee in a case similar to ours, uses the following language:

> "We are particular to note just here that we are not passing on a case where an employee, leaving employment in interstate commerce, selects one of several more or less dangerous means of exit from his place of employment because his employer had provided him no safe means; but we are passing on a case where the employer had provided a safe way out and the employe, ignoring it, selected a dangerous way. At that moment, we think, Krysiak ended his employment and lost the status of an employe in interstate commerce. Later, when he was killed, he was not engaged in his employer's work, or in an incident to it, but was engaged in his own private concerns."

We submit that in the instant case, in accordance with the facts, decedent could and should have stayed at Muncie, but of his own choice he went home for his own purposes, and included in the trip home the dangerous trip on the motor car.

In the case of *Young vs. New York, etc. R. Co.*, 74 Fed-(2nd) 251, 252, 253, the employee, after completing his day's work, rode on a train free as an employee to the place where he lived and then boarded the locomotive on which he was injured, to a place where he had left his street clothes, which he wanted. The court in holding that he was not then engaged in interstate commerce, uses the following language:

> "Conversely, if there are alternative ways of reaching the job, one across the employer's property and another elsewhere, the employer's liability will depend upon whether it is 'reasonably necessary' for the workman to use the first, or whether he does so merely for his 'convenience'."

Certainly in the instant case decedent was using the motor car to go home on his own purposes and for his own convenience.

On page 253 of decision, the court says:

> "Except that he wanted his street clothes left at Cedar Hill, into which to change, he could have gone home by trolley as the engineer did. *Certainly the defendant had no conceivable interest in this;* he was as good a fireman whether he went upon the streets of Springfield and New Haven in overalls or in street clothes." (Our Italics.)

Certainly in the instant case the respondent had no conceivable interest in the trip of decedent to his home to witness a basketball game.

In the case of *Sassaman vs. Pennsylvania R. Co.,* 144 Fed. (2nd) 950, 952-954, a train dispatcher rode on his employer's intrastate train while going home after work and was injured while alighting from the train on a station platform nine miles from his normal place of work. The court held he was not on the employer's premises so as to bring him within the Federal Employers' Liability Act.

> "He can therefore maintain a right of action under the Act, as it existed at the time of the occurrence in question, only if the defendant was then engaged as a common carrier in interstate commerce and he was employed by the carrier in such commerce."

Certainly decedent, in the instant case, was riding on an intrastate conveyance between Tipton and Sharpsville.

On page 952 of decision, the court says:

> "We believe it will be found in the cases just cited as well as generally that, in order for an injured employee to be able to claim a right of action under the Federal Employer's Liability Act, it must be made to appear that his injuries were sustained either upon the premises where he normally performed the duties of his employment or upon premises so closely adjacent thereto as to be a part of the working premises in the sense that the employee was required to traverse them in going to or upon leaving his work. In other words, the employee's presence upon the premises where he receives his injuries must have been a necessary incident to the discharge of the duties of his employment."

Certainly decedent, in the instant case, was not on the premises where he had been working during the day, nor on any premises closely adjacent thereto, and was not,

under the facts of this case, required to traverse these premises after his day's work was done. His doing so was not incident to the discharge of his duties, since they were at Muncie and he should have stayed at Muncie.

On page 953 of decision, the court says:

> "In short, the condition which makes possible a claim for injuries suffered as in the course of employment but which are actually received on premises away from the employee's place of employment is the fact that the employee must, of necessity, traverse such other premises in order to reach or depart from the place of the discharge of his duties. In such circumstances, he is upon the adjacent or other premises, as a requisite of his employment, either with the knowledge and consent or the approval of his employer, at the least, legally implied from the knowable situation.
>
> "But, that is not this case. When the plaintiff descended from his place of employment to the defendant's Jersey City Station he was free to travel home or go elsewhere, as suited his desires, by whatever means of transportation he chose. He was not required to travel on the defendant's train. Much less, was he required to travel upon a particular train. There was absent, therefore, the employer compulsion as to the mode of travel to and from work which serves to attach or continue the employee relationship, away from the place of employment, and makes an interstate employee's right of recovery for injury remediable under the Federal Employer's Liability Act."

Certainly in the instant case there was no compulsion on the part of respondent that decedent return home, or that he do so by the use of an automobile of a third party and a motor car appropriated by him to replace the one ordinarily used on his work and not provided for him for

going home but only used by him without objection.

On page 953 of decision, the court says:

> "We accordingly concede that the plaintiff was not acting within the scope of his employment at the time he received his injuries and that, consequently, he was not employed in interstate commerce at that time. It, therefore, follows that he does not have a right of action under the Federal Employers' Liability Act."

Certainly in the instant case decedent was not within the scope of his employment when he was going home for his own purposes contrary to instructions, and in neglect of the duties which he had to perform at Muncie.

We submit that decedent's employment in interstate commerce terminated when he boarded the private automobile at Muncie to go home for his own purposes in which respondent had no interest, and if his day's work was then terminated, it certainly could not be revived merely by the fact that he was availing himself of a permissive use of a motor car on respondent's premises.

We further submit that it can not reasonably be said that decedent was employed in interstate commerce on the trip which caused his death when he was going home for his own purposes and neglecting the duties which he had to perform and violating instructions of his superior.

Court Statement of Question Involved

In its decision of the instant case, the Circuit Court of Appeals correctly stated the question for decision as follows (R. 121):

> "The sole contested issue here is whether decedent at the time of the accident which resulted in his death was engaged in interstate commerce, and this issue depends upon whether at that time the

decedent was engaged in his employment with the defendant. Obviously, the court's jurisdiction is dependent upon the solution of this issue. In this connection, plaintiff contends that the issue was one of fact and was settled by the jury's verdict. The court below, however, in dismissing the action held as a matter of law that the decedent at the time of the accident was not engaged in his employment so as to be entitled to the protection of the Act. All the testimony (aside from certain stipulated facts) relative to this issue was offered by the plaintiff. There is no dispute as to any material fact, and we agree with the court below that the question for decision is one of law."

Court Decision of Question

The Circuit Court of Appeals correctly arrived at the following conclusions: (R. 125, 126, 127.)

"Applying the principles of these cases and others which could be cited, it is hardly open to question but that decedent's employment relationship ceased at the time he departed from Muncie in a privately owned automobile. When his work was completed on that day, he had the option of remaining in Muncie at the defendant's expense or making the trip to Sharpsville for the night. He chose the latter course. Certainly it cannot be thought that this action of the decedent was for the purpose of discharging any duty incident to or in connection with his employment. When he left Muncie, he was engaged solely in a personal activity unrelated to his duties as an employee of the defendant.

"Even so, we still have the question as to the decedent's status after he arrived at Tipton and commenced the journey from there to his home, during which the unfortunate accident took place. It is argued by the plaintiff that even though there was a deviation from the scope of his employment dur-

ing the trip from Muncie to Tipton, it was only temporary, and that his status as an employee was reestablished at Tipton."

"We think the question must be answered adversely to plaintiff's contention. Certainly the decedent's ill-fated trip from Tipton to his home in Sharpsville was for his own personal purpose and convenience the same as that from Muncie to Tipton. It was only a continuation of the same engagement, without any alteration of motive or purpose. The fact that he was permitted to utilize defendant's motor car as he had done in the past and that it was operated upon defendant's tracks has no tendency to re-establish the relationship which the decedent by his voluntary act had previously severed."

Affirmative Establishment of Jurisdiction

PROPOSITION E

Jurisdictional facts (in this case employment in interstate commerce at the time of injury) must be affirmatively established.

Royalty etc. Corp. v. City of Los Angeles (CCA, 9th Cir, 1938) 98 Fed (2) 551, 553;

United States v. Wilson (CCA 10th Cir, 1935), 78 Fed (2) 465, 467;

McNutt v. General etc. Corp. (1936) 298 U. S. 178, 189, 56 S Ct 780, 80 Law Ed. 1135, 1141;

Thomson v. Gaskill (1942) 315 U. S. 442, 446, 62 S Ct 673, 86 Law Ed. 951, 955;

Selite Corp. v. Decalite Co. (CCA 9th Cir 1938) 96 Fed (2) 242, 249;

Electro etc. Co. v. Strong (CCA 9th Cir 1936) 84 Fed (2) 766, 767;

Hill v. Walker (CCA 8th Cir 1909) 167 Fed 241, 243 et seq.

In the case of *McNutt v. General, etc. Corp.* (1936) 298 U. S. 178, 189, 56 S Ct 780, 80 Law Ed. 1135, 1141, the court, on the question of establishing jurisdiction, uses the following language:

> "In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence. We think that only in this way may the practice of the District Courts be harmonized with the true intent of the statute which clothes them with adequate authority and imposes upon them a correlative duty."

In the case of *Royalty, etc. Corp. v. City of Los Angeles* (CCA, 9th Cir, 1938) 98 Fed. 2d, 551, 553, the court says:

> "It is also settled by the recent decision of the Supreme Court in the case of McNutt v. General Motors Acceptance Corporation, 1936, 298 U. S. 178, 56 S Ct 780, 80 L. Ed. 1135, that under section 37 of the Judicial Code, 28 U. S. C. A., pg. 80, a plaintiff must plead the essential jurisdictional facts and must carry throughout the litigation the

> burden of showing that he is properly in court; that the District Court is vested with the authority to inquire at any time whether these conditions have been met; and that the authority so vested in the court by the statute 'precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure'."

In the case of *United States v. Wilson* (CCA, 10th Cir, 1935) 78 Fed. 2d 465, 467, the court says:

> "Where jurisdiction of the trial court depends upon the existence of a fact, that fact must be proven if put in issue by the pleadings."

Employment Relation Question of Law

PROPOSITION F

The question as to employment in interstate commerce at the time of injury was a question of law for the court for the reason: (1) that the question involved jurisdiction and (2) that the evidence bearing on the question was uncontroverted.

Texas etc. R. C. v. Gulf etc. R. C. (1926) 270 U. S. 266, 274, 46 S Ct 263, 70 Law Ed. 578, 582;

Shanks v. Delaware etc. R. C. (1916) 239 U. S. 556, 559, 36 S Ct 188, 60 Law Ed. 437, 438;

New York etc. R. Co. v. Powell (1943) 221 Ind. 321, 331, 47 NE (2) 615, 619;

Brady v. Southern R. Co. (1943) 320 U. S. 476, 479, 64 S Ct 232, 88 L. Ed. 239, 243;

Middleton v. Southern etc. Co. (CCA 5th Cir 1932) 61 Fed (2) 929, 930;

A. B. Small Co. v. Lamborn & Co. (1925) 267 U. S. 248, 45 S Ct 295, 69 L. Ed. 597, 600.

In the case of *Texas, etc. R. Co. v. Gulf, etc. R. Co.* (1926), 270 U. S. 266, 274, 46 S Ct 263, 70 Law Ed. 578, 582, the court says:

> "If the facts are agreed, the question is one of law. If they are not agreed, the court must find them. In the case at bar, the District Court, having jurisdicton generally of the parties and of the subject matter, was called upon to determine whether an allegation in the bill, essential to the cause of action, was established. This, the court clearly had power to do. Moreover, even if the question presented were, as contended, properly one of jurisdiction, the objection urged could not prevail. Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist."

In the case of *Shanks v. Delaware, etc. R. Co.* (1916) 239 U. S. 556, 559, 36 S Ct 188, 60 Law Ed. 437, 438, the Supreme Court of the United States considered the evidence in the record on the question of interstate commerce employment and upon that evidence applied the test and held as a matter of law that interstate commerce employment did not appear.

On the question of the function of the trial court in ruling upon a motion for a directed verdict, which requires a determination of the sufficiency of the evidence as a matter of law, the Indiana rule and the Federal rule are essentially the same.

In stating that rule the Supreme Court of Indiana, in the case of New York, etc. R. Co. v. Powell (1943), 221 Ind. 321, 331, 47 N. E. (2nd) 615, 619, says:

> "While this judicial function is generally invoked in passing upon the sufficiency of pleadings, it often arises again upon the evidence, and where the evidence most favorable to the plaintiff is insufficient to establish negligence in law, the court should dispose of the matter and not permit the question to go to the jury."

On the same question the Supreme Court of the United States has very clearly laid down the proper test. In the case of *A. B. Small Co. v. Lamborn & Co.* (1925) 267 U. S. 248, 254, 45 S Ct 295, 69 L. Ed. 597, 600, the court says:

> "The rule for testing the direction of a verdict, as often has been held, is that *where the evidence is undisputed,* or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for the other party. The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury, has met with express disapproval in this jurisdiction, as in many others." (Our Italics.)

It will be noted that in the above rule the first alternative case stated is "where the evidence is undisputed." It is our understanding that evidence is not disputed unless one witness contradicts another, or contradicts written evidence. The mere fact that a question arises as to how the law should be applied to the facts is not a dispute in the evidence. We submit that, in the instant case, there was no dispute on any matter relating to interstate commerce between any of the witnesses, and no contradiction of one witness by another. Therefore, the only necessity is an application of the law to the proven facts, and this becomes a duty of the court and cannot be properly submitted to the jury.

Questions Properly Raised in Trial Court

Respondent's assertions that decedent's employment had terminated and that (1) the trial court had no jurisdiction

under the Federal Act and (2) that, under the uncontroverted evidence, petitioner was not entitled to recover as a matter of law, were properly and repeatedly raised by denial in the answer (R. 6), by motion to dismiss (R. 9) and motion for directed verdict (R. 10) filed at the close of petitioner's evidence, and repeated at the close of all the evidence (R. 11, 12) by respondent's tendered instruction 1 (R. 95), by respondent's objection to the court's charge to the jury (R. 91, l. 42 to 93, l. 4), and by respondent's motions after verdict (R. 97, 98).

PROPOSITION G

The question of the trial court's jurisdiction of the subject matter may not be waived and may be raised at any time by the parties, or by the court, and is properly raised by a motion to dismiss.

Federal Rules of Civil Procedure ,Rule 12(h) superseding 18 Stat 472 (1875) 24 Stat 555 (1887) 25 Stat 436 (1888) 36 Stat 1098 (1911) Jurisdictional Code, sec. 37, 28 USCA (1927 ed) sec. 80;

Mitchell v. Maurer (1934) 239 U. S. 237, 244, 55 Sct 162, 79 L. Ed. 338, 343;

Ex parte McCardle 7 Wall, 506 (1869) 19 L. Ed. 264, 265;

Minnesota v. Hitchcock (1902) 185 U. S. 373, 382, 22 S Ct 650, 46 L. Ed. 954, 961;

Bell v. Hood (CCA Cal. 1945) 150 Fed (2) 96, 98.

PROPOSITION H

Respondent's motions filed after verdict (R. pp. 97, 98) asking that the verdict be set aside and appropriate judgment rendered, constituted proper procedure.

Federal Rules of Civil Procedure, Rule 50.

No Attempt to Amend Made

PROPOSITION I

Aside from the question of jurisdiction, plaintiff failed to prove employment in interstate commerce and, hence, failed to establish a cause of action under the Federal Employers' Liability Act. She did not seek to amend her complaint to conform to the evidence, if any, to support a cause of action under the Indiana wrongful death statute. The record shows no request of petitioner to instruct the jury under the state law. Hence, the trial court should have directed a verdict for respondent.

Shafor v. Illinois etc. R. Co. (1916) 172 Ky. 337, 189 SW 237.

No Recovery Under State Law

PROPOSITION J

Aside from the question of jurisdiction and aside from the question of variance and failure to amend, if decedent was not employed in interstate commerce at the time of injury, as respondent here contends.

(1) the Federal Employers' Liability Act would not apply and the cause of action (between two strangers—not master and servant) was governed by the Indiana wrongful death statute (limit of recovery $10,000) and common law negligence.

Indiana Acts 1937, Ch. 292, Sec. 3, p. 1341, B. R. S. (1933) Sec. 2-404;

35 Stat 65 (1908), 53 Stat 1404 (1939), 45 USCA, Sec. 51 (Federal Employers' Liability Act).

(2) contributory negligence was shown by the uncontroverted evidence as a matter of law and was an absolute bar to recovery under the Indiana wrongful death statute.

Chicago etc. R. Co. v. Hedges, admr. (1888) 118 Ind. 5, 11, 20 NE 530;
New York etc. R. Co. v. Miller, admr. (1936) 101 Ind. App. 498, 502, 200 NE 78;
Wabash R. Co. v. Zayac (CCA 7th Cir 1929) 30 Fed. (2) 764, 766.

(3) and respondent's motion for directed verdict filed at the close of all the evidence should have been sustained.

Brady v. Southern R. Co. (1943) 320 U. S. 476, 479, 64 S Ct 232, 88 L. Ed. 239, 243;;
Scocozza v. Erie R. Co. (CCA 2nd Cir 1949) 171 Fed. (2) 745, 746;
New York etc. R. Co. v. Powell (1943) 221 Ind. 321, 331, 47 NE (2) 615, 619;
Delaware etc. R. Co. v. Koske (1929) 279 U. S. 7, 12, 49 S Ct 202, 73 L. Ed. 578, 582;
Hamble v. Brandt (1935) 98 Ind. App. 399, 404, 189 NE 533, 535;
Gulf etc. R. Co. v. Wells (1928) 275 U. S. 455, 459, 48 S Ct 151, 72 L. Ed. 370, 372.

Answering Petitioner's Contentions

Respondent now desires to specifically refer to petitioner's contentions in this proceeding, with references at the beginning of various paragraphs to the *pages of petitioner's petition and brief* to which reference is made, namely, pages 4 to 6 and 11 to 23.

(In this portion of our brief, we are assuming that this court would prefer that we omit the citations which appear in petitioner's petition and brief following the cases, and on the pages, to which we make specific reference.)

(P. 4) The *Erie Railroad Company* case cited states the rule with regard to "going home from work." However, according to the facts of that case, the employee had never

left the employer's premises and was walking on those premises when injured.

The *Cardillo, Voehl and Cudahy* cases are workmen's compensation cases and turned largely on the effect of the finding of the trial court. Moreover, in each of those cases, transportation was furnished *from the place of work,* without interruption of travel in a private automobile for a period of several hours and for a distance of 42 miles off the premises of the employer, as in this case, and without the additional distinguishing feature, established in this case, that decedent should have stayed at Muncie.

There is, therefore, no conflict between the decisions above referred to and the decision of the Court of Appeals in the instant case, since the established rules were applied to different facts.

(P. 5, 6) In the *Maryland Casualty Company* case an automobile was owned by a corporate employer and kept at the home of the secretary of the corporation. The automobile was used for company business whenever needed and sometimes, by permission, by the wife of the secretary. Part of the employee's duties consisted of washing and greasing the automobile. The employer paid all expense of maintenance and operation of the automobile. On the occasion in question the employee was directed by the secretary to go to his home and wash the automobile. By choice the employee used busses for transportation to the secretary's home and transferred from one bus to another. On the occasion in question, at the point of transfer, the employee transacted some business of his own. He returned to the transfer bus and was injured in alighting therefrom. The court held (1) that the employee was a general utility man on duty when looking after company property pursuant to orders and (2) that, although he

deviated from the trip home for his own purpose, he was *going back to work* when he was injured. The distinction from the instant case is that when decedent boarded the motor car at Tipton he was not going back to work, but was resuming his trip to see a basketball game.

The *Lytle* case involves workmen's compensation and the effect of the finding of the trial court. In this case the employee was *going back to work* from a point near the place of work in a truck owned and furnished by his employer.

There is, therefore, no conflict between the decisions above referred to and the decision of the Court of Appeals in the instant case, since the cited cases involved "going back to work," and not proceeding on in the sole purpose of the employe in which the employer had no interest.

The *Bailey, Tiller, Tennant, Lavender* and *Wilkerson* cases, cited in the last paragraph on page 5, and again on pages 11 and 13, all involve the issue of negligence, and in each of those cases the jury was permitted to draw inferences because inferences were possible under the facts of the particular cases. In the instant case there is no dispute in the essential facts, nor any difference in the inferences which might be drawn. As bearing upon the question of submission of cases to a jury, we would refer the court to Proposition F, page 22, supra.

(P. 11) The *Bailey, Tiller, Tennant, Lavender* and *Wilkerson* cases here cited have been referred to in the last preceding paragraph, supra. The *Cardillo, Voehl* and *Cudahy* cases here cited have been referred to (p. , supra).

(P. 13) We have already distinguished the first five cases cited on page 13 (p. 29, supra) and have heretofore

referred to the Erie Railroad Company case (p. 27, supra).

In the *Zachary* case the employee had not left the premises of the employer and it was held that the brief visit to his boarding house was not inconsistent with his duties.

In the *Morris* case the employee was killed on the employer's premises while going to work. The case turned on the employee's choice of route, but, at any rate, he was going back to work on the employer's premises and not traveling a distance of 42 miles for a period of two hours off the employer's premises solely for purposes of his own, as was established in the instant case.

(P. 14) In the *Coleman* and *Louisville* cases the employee was walking from work on the employer's premises, on the route customarily used, to his lodging, which was furnished by the employer.

In the *Rogers* case the employee left the locomotive and went across the street to buy a personal item and *was returning to work* on the employer's premises when he was killed.

We submit that the facts of the three cases last above referred to distinguish them from the instant case.

In the *Atlantic, etc. Company* case the employee was boarding a shuttle train furnished by the employer for the purpose of carrying employees to work, and there was no intermediate cessation of the trip by private automobile, as in the instant case.

In the *Ramsay* case the employee was traveling by handcar furnished by his employer and in the control of a foreman designated by the employer to direct the movements of the employee and, again, there was no intermediate use of a private automobile.

In the *Southern Railroad Company* case the facts were basically identical with the facts of the *Ramsay* case.

In the *Covington* case the facts are very similar to the last three cases above referred to.

In the *San Pedro* case the employee was riding on a hand car furnished by the employer at the direction of his foreman (1) going to his place of work (and not for his own specific purpose of seeing a basketball game) and (2) taking the hand car to its place of destination.

In the *Horton* case the employee was traveling on a hand car furnished by the employer and traveling on his employer's premises from his home *to his place of work.*

In none of the cases cited by petitioner on page 14 will the court find the distinguishing features present in the instant case, namely, the long trip in the private automobile off the premises of the employer, the fact that the employee should have stayed at Muncie, and the further fact that when decedent went back to the premises of the employer and resumed the trip on the motor car, he was still proceeding on his own specific purpose and was not going back to work.

P. 15, 16) Here petitioner discusses some of the cases theretofore cited (p. 4, 5, 13, 14) and hereinabove referred to (pp. , supra).

(P. 17) In the *Bountiful Brick Company* case, here cited, the employee was *going to work* over the premises of another "in such proximity and relationship as to be in practical effect a part of the employer's premises." In the instant case the employee was not going to work and was injured at a place far distant from Muncie, his then place of employment. This case is quoted and discussed in the opinion of the Circuit Court of Appeals (R. 123).

The *Cudahy* case has already been discussed (p. 28, supra).

(P. 18) In the *Kellog* case, here cited, the employer was transporting employees to work and the employee was injured enroute by negligence of the employer. We submit the facts of this case are not pertinent.

The *Cardillo* case has already been discussed (p. 28, supra).

Petitioner cites the *Carillo, Heaps* and *W. C. Sharp* cases on the proposition that a substitute conveyance does not remove the case from the normal rule, but in each of these cited cases the difference in the facts removes them as authority.

(P. 19, 20) The *Rogers, Maryland* and *Lytle* cases, here cited, have already been discussed (pp. 28-30, supra).

Conclusion

In conclusion respondent respectfully submits that there is no occasion or right of certiorari shown in this case, either on the ground of conflict in the decided cases or a new question of law.

This court has laid down general rules as to the status of an employee when going to and from work, but obviously each case will normally stand on its own merits.

Respondent submits that petitioner's decedent was not within the rule governing *going home from work,* because

(1) his duty required him to remain at Muncie, where he could have stayed at the expense of his employer;

(2) several hours elapsed from the termination of his work until his resumption of his trip home by motor car;

(3) the employee, after terminating his work, traveled

42 miles by private automobile of his own procurement, without any consent of his employer, before he resumed his trip home by motor car, and

(4) the employee was engaged entirely in his own personal pursuit in which the employer had no interest, namely, going to a basketball game.

Respondent further submits that petitioner's decedent was not within the rule regarding *going to work*, because he was not going to work, but was going to Sharpsville solely for his own purposes.

Respondent is unable to draw conclusions with any more force and clarity than the Circuit Court of Appeals in its decision of this case, to which we would respectfully refer this court (R. 125-127).

Wherefore, respondent prays that certiorari be denied.

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